No. 83-1894

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, and ITS ROCKFORD and BELOIT ASSOCIATIONS

v.

NATIONAL LABOR RELATIONS BOARD

and

ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

Of Counsel:
STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CARL L. TAYLOR
GLENN SUMMERS
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Attorneys for the Chamber of Commerce of the United States, Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Does the establishment of a *de facto* closed shop through the dual effect of the union's failure to notify new employees of their right not to become full union members and the anti-resignation rule violate the labor law policy against closed shops, as well as frustrating the labor law policy protecting the employee's right to refrain from concerted activities?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1894

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, and ITS ROCKFORD and BELOIT ASSOCIATIONS

v.

NATIONAL LABOR RELATIONS BOARD

and

ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE AMICUS

This case presents the question of whether a union may lawfully enforce a rule prohibiting a union member from resigning his membership in anticipation of or during a strike. The National Labor Relations Board

("Board") held that such a rule improperly burdens the employee's right to refrain from concerted activities, a right protected by Section 7 of the National Labor Relations Act ("Act"), 29 U.S.C. § 157 (1982). The Board accordingly found the petitioners here guilty of an unfair labor practice for imposing court-collectible fines on employees who sought to resign their membership and return to work during a strike. The United States Court of Appeals for the Seventh Circuit enforced the decision, while the United States Court of Appeals for the Ninth Circuit denied enforcement in a case presenting a similar issue.

The Chamber of Commerce of the United States urges the Court to affirm the position of the Seventh Circuit and the Board.[1] The Chamber of Commerce is the largest business and professional organization in the United States. Its membership includes more than 4,000 state and local chambers of commerce and trade and professional organizations as well as 180,000 business firms and individual direct members. Many of its members are signatories to collective bargaining agreements with unions that have limitations on resignations similar to the one at issue here. The Chamber of Commerce thus has a significant interest in urging the vindication of the right of its members' employees to have freedom of choice with respect to supporting their union or their employer during a strike.

SUMMARY OF ARGUMENT

League Law 13 purports to restrict an employee's right to resign from the Union during a strike or lockout or when a strike or lockout appears imminent. The rule improperly burdens the employee's Section 7 right to refrain from concerted activities, and the Chamber of

[1] The parties to this case have provided their written consent to the filing of this brief. The letters granting consent have been filed with the Clerk.

Commerce urges affirmance for the reasons stated by the Court below and by the Board.

The Chamber also urges affirmance of the result below because of an additional labor law policy that is impaired in the circumstances of this case: the policy against closed shops. The Union failed to disclose to new employees that they were not required to become full members of the Union. The members' joining of the Union therefore was not a voluntary act. League Law 13 compels continued subjection to the Union by precluding resignations at or after the expiration of the collective bargaining agreement. The members had no meaningful choice as to joining the Union and no meaningful choice as to leaving the Union, thus creating a *de facto* closed shop.[2]

The Taft-Hartley Act squarely prohibits closed shops, and the legislative history confirms the congressional determination that the closed shop was an evil to be eliminated. Nothing in the legislative history supports the view that a union can evade the prohibition through an anti-resignation rule in conjunction with the union's failure to notify the employees in the first instance of their right not to join. League Law 13 thus "invades or frustrates an overriding policy of the labor laws," and the rule therefore may not be lawfully enforced. *Scofield v. NLRB*, 394 U.S. 423, 429 (1969).

[2] A "closed shop" is an arrangement banned by the Taft-Hartley Act whereby an individual is required to become a full union member as a condition of obtaining and maintaining employment. The Union here creates a *de facto* closed shop by making it a practical impossibility for an employee to have his job without being a full union member.

ARGUMENT

I. LEAGUE LAW 13, IN CONJUNCTION WITH THE UNION'S ADMINISTRATION OF ITS UNION-SECURITY CLAUSE, VIOLATES THE LABOR POLICY AGAINST CLOSED SHOPS AND THEREFORE CANNOT VALIDLY BE APPLIED.

The Court provided the analysis for assessing the validity of a union rule in *Scofield v. NLRB*, 394 U.S. 423, 430 (1969): "[A] union [is] free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." League Law 13 prevents a member from withdrawing from the Union during a strike or lockout or when a strike or lockout "appears imminent." Appendix 2a (hereinafter "App."). As found by the Board below and affirmed by the Seventh Circuit, the rule impairs the congressional policy establishing the right of an employee to refrain from concerted activities and therefore cannot lawfully be enforced. App. 12a, 4a-6a. The Chamber of Commerce supports the analysis of the Board and the Seventh Circuit and therefore urges affirmance for the reasons stated in the Board and the lower court's opinions.

The *Scofield* test is a balancing test. *See* App. 6a-7a. It is thus appropriate to consider in the balance a related congressional policy that is implicated in the circumstances of this case: the policy against the closed shop. The record in this case demonstrates that employees are not advised of their rights and are not given a meaningful choice as to whether to become full members of the Union subject to Union discipline. The employees are compelled involuntarily to join the Union, and League Law 13 ensures that the employees cannot voluntarily leave the Union. The Union thus achieves a

functional closed shop, in contravention of the congressional policy imbedded in the Taft-Hartley Act against such compulsory unionization. League Law 13 does not reflect a legitimate union interest and impairs the congressional policy against closed shops, providing an independent ground in further support of the result reached by the court below.

The closed shop was a particular evil that the Taft-Hartley Act was enacted to prevent. Sections 8(b)(1), 8(b)(2), 8(a)(1), 8(a)(2), and 8(a)(3)[3] "form a web . . . preventing the union from inducing the employer to use the emoluments of the job to enforce the union's rules." *Scofield*, 394 U.S. at 429. For that reason, where a valid union-security clause exists, involuntary "membership" is restricted to the "financial core" of the payment of fees and dues, *NLRB v. General Motors Corp.*, 373 U.S. 734, 743 (1963), and a union may not impose judicially enforceable penalties on an employee who is not a full member, *see NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 196-97 & n.37 (1967). *See also United Stanford Employees*, 232 NLRB 326 (1977) (union notification to new employees that they were required to become full members constitutes unfair labor practice).

The collective bargaining agreements involved in this case had a union-security clause. *See* App. 11a, 14a & n.8, 16a n.13. Although the specifics of the clause are not stated, the record demonstrates that the union did not advise employees of their right to limit their participation to the financial core and told employees they had to become full members of the union to maintain their jobs. The Board found that the Beloit Association "improperly equated continued employment under [the union-

---

[3] 29 U.S.C.§§ 158(b)(1)-158(b)(2), 158(a)(1)-158(a)(3) (1982).

security] agreement with the obtainment of full membership in its organization." App. 16a n.13.

Thus, for example, when employee John Nelson first began working for Atlas in March 1977 prior to the strike, the Shop Captain instructed him "to join the Union" by filing a membership application and taking the "oath of obligation." Testimony of Don Hansen, Hearing Transcript at 68, 44.[4] When Nelson subsequently tendered his dues in January 1977, the Union returned his check stating: "Since you are not a member of this Association [the Union] can not accept any payment from you for dues you don't owe." App. 29a.[5] Other communications between the Union and employees similarly display a failure by the Union to disclose the employee's right to avoid full Union membership. *See, e.g.*, App. 16a, 29a-30a.

The petitioners rely on the members' "Oath . . . obligating them to adhere to the Union's 'Constitution, Laws, Rules and Decision,'" Pet. Brief 3, as demonstrating a voluntary acceptance of the limitation on resignation. *See* Pet. Brief 13. The oath can have no meaning, however, where the employee was not informed that he did not have to take the oath. Similarly, the petitioner's reliance on "the common law doctrine on withdrawal from *voluntary* association," Pet. Brief 35 (emphasis added), is inapposite since the joining of the Union here fundamentally was involuntary.

---

[4] It is the Chamber's understanding that the Board has lodged with the Clerk of the Court the full record of the proceedings, permitting references to the testimony before the Administrative Law Judge.

[5] The Board determined that the Union's failure to apprise the employees of their financial obligations and subsequent attempt to have them discharged for failure to meet those obligations constituted a separate violation in addition to the unfair labor practice arising out of its enforcement of League Law 13. *See* App. 14a-16a; pp. 7-8 *infra*.

Having thus compelled employees to become full members, the Union then sought to lock the employees in through League Law 13. The practical effect of and clear intent behind League Law 13 is to prevent any meaningful opportunity for an employee to leave the Union. He cannot resign prior to the expiration of the collective bargaining agreement while a new contract is being negotiated, because at that point a strike arguably "appears imminent." *See* App. 34a n.12. ("the language precluding resignations when a strike 'appears imminent' is so vague and susceptible to such varying interpretations as to severely limit the statutory right of members to resign even prior to a strike vote and possibly even prior to the commencement of negotiations") (ALJ Opinion). He cannot resign after the collective bargaining agreement expires, because at that point a strike is actually in effect. With the onset of a new contract with the same union-security clause, he will be subject to the same union compulsion to remain a full member that led to his initial membership.

Thus, League Law 13 in conjunction with the Union's failure to disclose the employee's right to refrain from full membership precludes any meaningful choice concerning the employee's subjection to Union discipline. The employee involuntarily joins the Union and involuntarily must remain in the Union.

The dual effect of League Law 13 and the Union's nondisclosure policy is similar to the situation where a union does not notify an employee of his obligation to remit dues and fees and then compels the employer to discharge the employee for failure to tender the payments. The Board and the courts have held that a union has a fiduciary duty to disclose a member's obligation to remit dues and fees and that breach of this duty precludes the union from seeking the discharge of an employee for his failure to meet the financial obligation. The Board has long held that a union has an "*affirmative* duty under the

Act specifically to inform an individual of his obligations and afford him a reasonable opportunity to satisfy them before seeking his discharge under a union-security clause." *Chauffeurs, Salesdrivers, & Helpers Union, Local 572, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers (Ralphs Grocery Co.)*, 247 NLRB 934, 935 (1980) (emphasis in original). *Accord, Teamsters Local 122 (August A. Busch & Co.)*, 203 NLRB 1041 (1973), *enforced*, 502 F.2d 1160 (1st Cir. 1974); *Philadelphia Sheraton Corp.*, 136 NLRB 888 (1962), *enforced*, 320 F.2d 254 (3d Cir. 1963). *See* App. 15a-16a, n.5 *supra*. The Courts have confirmed the Board's policy. *See, e.g., General Teamsters Local 162 v. NLRB*, 568 F.2d 665, 668 (9th Cir. 1978); *NLRB v. Local 182, International Brotherhood of Teamsters*, 401 F.2d 509 (2d Cir. 1968), *cert. denied*, 394 U.S. 213 (1969).

By the same token, the Union cannot have it both ways here. It cannot compel Union membership by failing to inform employees of their right not to be full members and then apply a restriction on their resignation. The result as a practical matter is a closed shop, a result antithetical to the policy embodied in the Taft-Hartley Act. League Law 13 "invades or frustrates an overriding policy of the labor laws" and therefore cannot lawfully be enforced where the Union initially has failed to inform the member of his right not to be in the Union. *Scofield*, 394 U.S. at 429.

II. THE LEGISLATIVE HISTORY OF THE TAFT-HARTLEY ACT DEMONSTRATES THAT CONGRESS INTENDED NO IMPLIED EXCEPTION TO THE POLICY AGAINST CLOSED SHOPS.

A. The Elimination of Closed Shops Was a Major Goal of the Taft-Hartley Act.

The closed shop was a major target of the Taft-Hartley Act. The report of the House Education and Labor Committee accompanying the House bill stated categorically:

"The bill bans the closed shop." H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947), *reprinted in National Labor Relations Board, Legislative History of the Labor Management Relations Act of 1947*, 300 (1948) [hereinafter cited as "Leg. Hist."]. The Senate Committee on Labor and Public Welfare was more expansive in detailing the evils of the closed shop, but no less certain in its opposition: "It is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated. . . . Numerous examples were presented to the committee of the way union leaders have used closed-shop devices as a method of depriving employees of their jobs, and in some cases a means of securing a livelihood in their trade or calling, for purely capricious reasons." S. Rep. No. 105, 80th Cong., 1st Sess. (1947), Leg. Hist. 412.

The Act thus set up the "web" of statutory provisions noted by the Supreme Court in *Scofield*[6] designed to prevent the closed shop. Perhaps the most important of these sections was Section 8(a)(3), which, along with the companion Section 8(b)(2), prohibited the employer and the union from discriminating against an employee whose union membership has been denied or terminated "for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(a)(3) (1982).

The House Conference Report noted that these provisions "abolished the closed shop." H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41 (1947), Leg. Hist. 545. This Court stated that under this provision Congress intended to eliminate "the most serious abuses of compulsory unionism . . . by abolishing the closed shop." *NLRB v. General Motors Corp.*, 373 U.S. 734, 739 (1963).

---

[6] 394 U.S. at 429.

B. The Legislative History on Which the Petitioners Rely Does Not Demonstrate A Congressional Intent To Permit An Implied Exception to the Policy Against Closed Shops.

The petitioners discuss at length the legislative history of the Taft-Hartley Act in an effort to show that the Section 8(b)(1)(A) proviso permits the Union to enforce League Law 13.[7] That proviso, however, is concerned only with a union's power to admit and expel members, and nothing in the legislative history bespeaks a congressional understanding that the proviso permits the Union to employ a resignation rule in derogation of the congressional policy against closed shops.

Section 8(b)(1) makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of their Section 7 rights, with the proviso that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U.S.C. § 158(b)(1)(A) (1982). The proviso had the narrow purpose of ensuring that the congressional prohibition of closed shops did not impair the union's right to set membership criteria and to expel members for failure to remit required financial support. The proviso was not intended to provide a backdoor method for reintroducing closed shops.

As noted before, Section 8(b)(2) in conjunction with Section 8(a)(3) bans the closed shop while permitting

---

[7] The petitioners also expend considerable effort attempting to show that the § 7 right to refrain from concerted activities does not affect a resignation rule. The Chamber of Commerce's brief focuses on the congressional policy against closed shops rather than on the policy against restricting an individual's right not to engage in concerted activities. The Chamber therefore does not address in detail the petitioners' arguments regarding the legislative history of § 7, but rather expresses its support of the respondent Board's rebuttal.

the union shop and other lesser forms of compulsory unionism. Section 8(b)(2) permits the union to expel a member only for his failure "to tender the periodic dues and the initiation fees uniformly required as a condition of *acquiring* or *retaining membership.*" 29 U.S.C. § 158(b)(2) (1982) (emphasis added). The similarity of language to Section 8(b)(1)(A) is significant and demonstrates that the proviso's use of "acquisition of retention of membership" was intended simply to bring the generalized prohibition against restraint or coercion of section 7 rights into conformity with the union's power to enforce a valid union-security agreement through expulsion.

The statement by the sponsor of the proviso confirms its limited purpose. Senator Holland offered the amendment from the Senate floor to ensure that Section 8(b)(1) did not "affect at least that part of the internal administration [of the union] which has to do with the *admission* or the *expulsion of members*, that is with the questions of membership." 93 Cong. Rec. 4398 (April 30, 1947), Leg. Hist. 1139 (emphasis added). There is no indication that the proviso was intended to cut a broad swath for union rules permitting them to override other congressional policies, particularly the policy against closed shops.

Similarly, Congress' determination not to enact the proposed Section 8(c)(4) in the House bill cannot be taken as an implied congressional decision to permit a resignation rule that fosters a closed shop. As part of a proposed "employee bill of rights," House Section 8(c)(4) would have specifically made it an unfair labor practice for the union "to deny to any member the right to resign from the organization at any time." Leg. Hist. 53. The Senate conferees rejected almost the entire House package because "the language which protected an employee from losing his job if a union expelled him for some reason other than nonpayment of dues and initiation fees, uni-

formly required of all members, *was considered sufficient protection.*" 93 Cong. Rec. 6601 (June 5, 1947), Leg. Hist. 1540 (remarks of Sen. Taft) (emphasis added). Thus, the failure to enact proposed Section 8(c)(4) cannot be taken as a basis for undercutting the closed shop prohibition because it was the very existence of the closed shop provisions that led to the rejection of the House proposal.

The Taft-Hartley Act contains a broad prohibition against closed shops. The legislative history confirms Congress' resolve to eliminate the closed shop, and nothing in the legislative history indicates an intent to permit union rules to evade that prohibition.

CONCLUSION

In the guise of "maintaining a united front," Pet. Brief 13, the Union here has promulgated a rule that polices the members and forces them to remain in the Union against their will. Because in the first instance the Union failed to disclose to the members their right to avoid full membership, the rule creates a *de facto* closed shop evading the prohibition of the Taft-Hartley Act. League Law 13 thus does not reflect a legitimate union interest and impairs a policy Congress has imbedded in the labor laws. *See Scofield*, 394 U.S. at 430. The Chamber therefore respectfully urges that the decision of the Seventh Circuit be affirmed.

Respectfully submitted,

CARL L. TAYLOR
GLENN SUMMERS
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Attorneys for the Chamber of Commerce of the United States, Amicus Curiae

Of Counsel:
STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Dated: December 19, 1984